Case No. 07-1409

IN THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

M.A.L., a minor child, by and through his parents
and next friends, M.L. and S.A.,

Plaintiffs-Appellee

v.

STEPHEN KINSLAND, *et. al*

Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, MICHIGAN SCHOOL BOARDS ASSOCIATION, OHIO SCHOOL BOARDS ASSOCIATION, AND THE TENNESSEE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M.A.L.

v.

KINSLAND, *et. al*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, National School Boards Association, American Association of School Administrators, National Association of Secondary School Principals, Michigan Association of School Boards, Ohio School Boards Association and Tennessee School Boards Association make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

_____ _____

Signature of Counsel *Date*

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Wendell Anderson, School Dress C

this case, result in more confusion for those responsible for educating our nation's children, there is a high cost to all involved.

This brief is filed with the consent of both parties pursuant to Federal Rule of Appellate Procedure 29(a).

ARGUMENT

I. This Court Should Provide Public Schools With Clear Guidance As To The Legal Standard Governing Content-Neutral Time, Place, and Manner Restrictions On Student Speech

Few areas of law confront school officials with more legal and political minefields than disputes over student speech. The courts themselves have

basis, at a moment's notice, and usually without the luxury of extended legal consultation.[3]

Adding to the legal confusion and complexity as to the requirements of the U.S. Constitution as construed by federal courts is the need for school officials to navigate the results of increasing forays into this area by other levels and branches of government. These include federal statutes[4]; state constitutions; state statutes[5]; administrative and regulatory guidelines[6]; and even nonregulatory guidance.[7]

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[3] *Morse*, at *21 (Breyer, J., concurring in part and dissenting in part) ("Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our

the same advocacy tactic, testing the legal bounds of content-neutral time, place, and manner rules governing student speech that is not school-sponsored and does not occur in a curricular context. Although this question is distinct from those considered in *Tinker v. Des Moines Independent Community School District*,[11] *Bethel School District No. 403 v. Fraser*,[12] and *Hazelwood v. Kuhlmeier*,[13] all of which concerned restrictions based on content or viewpoint, the District Court nevertheless joined a few other courts that have determined that the answer is to be found in *Tinker*, rather than in the public forum analysis that generally applies to such rules.

Certain aspects of forum analysis itself have been the source of significant judicial inconsistency. This Court has noted the uncertainty among the courts over whether a "designated public forum" differs from a "limited public forum" and, if so, what legal standard governs each.[14] Courts have varied in their determinations as to what kind of forum is in question when evaluating school speech cases.[15]

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[11] 393 U.S. 503 (1969).
[12] 478 U.S. 675 (1986).
[13] 484 U.S. 260 (1988).
[14] *United Food & Commercial Workers Local 1099 v. City of Sydney*, 364 F.3d 738, 750 (6th Cir. 2004) (noting judicial confusion surrounding use of terms); *Putnam Pit v. City of Cookeville*, 221 F.3d 834, 842 n.5 (6th Cir. 2000) (same).
[15] *Compare Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (finding school hallways and libraries were nonpublic forum) *and Harless v. Darr*, 973 F.Supp. 1351 (S.D. Ind. 1996) (finding classroom was nonpublic forum) *with Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 8 F.3d 1160 (7th Cir. 1993) (finding classroom was limited open forum) *and Slotterback v. Interboro*

Courts also have struggled at times with characterizing speech regulations as "content-based" or "viewpoint-based."[16]

Regrettably, the District Court's ruling in this case has added to the confusion for schools. As discussed below (*infra* at II), the District Court's

The model school board policies provided to member school districts by the

so many courts ever would have engaged in forum analysis in school cases in the first place and which standard governs their decisions.

Tinker's "material and substantial disruption" standard would place an evidentiary burden on schools greater than the relatively more deferential standards

the absence of past incidences,[29] or whether they attribute the disruption not to a precipitating incident but to the school's actions in response,[30] accepting the invitation to shift from forum analysis to *Tinker* for time, place, and manner rules would change not only the mode of inquiry but many outcomes.

The end result of relying on *Tinker* to evaluate all public school decisions concerning private expression by students in non-classroom school fora would be a legal and policy paradox. School officials would have less professional discretion over the use of school facilities than is exercised by any other public entity over any other forum on public property—despite the fact that the speakers and hearers in question are children.[31]

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[29] *E.g., Saxe v. State College Area Sch. Dist.*

This cannot be what the U.S. Supreme Court intended. As the Seventh Circuit has observed, “Prohibiting handbilling in the hallway between classes is also reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter when the recipient indiscriminately discards the handout.”[32]

equipment on campus.[35] Student perpetrators of online denigration or cyberbullying of classmates and teachers and false online profiles frequently have sought refuge in *Tinker*, sometimes with success.[36] Teachers have discovered that even the classroom itself is not always a sanctuary against the threat of lawsuits challenging the ground rules they set for their students.[37]

Given these examples of *Tinker's* expansion, it is not difficult to imagine other contexts in which litigants might seek to impose *Tinker's* more rigid standard on educator decisions. While content-neutral student dress codes and school uniform policies have been upheld using the forum analysis approach to time, manner, and place regulations or a close variation thereof,[38] the prospect of having

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[35] *Coy v. North Canton City Schs.*, 205 F.Supp.2d 791, 799-800 (N.D. Ohio 2002).
[36] *E.g.*, *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, No. 06-3395-cv (2d Cir. July 5, 2007) (finding reasonable forecast of disruption under *Tinker* arising from student's instant message depicting teacher being shot in head); *Mahaffey v. Waterford Sch. Dist.*, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (invalidating under *Tinker* student's suspension for web page called "People I wish Would Die" because no evidence of disruption).
[37] *E.g.*, *Peck*, 426 F.3d 617 (rejecting application of *Tinker* to challenge of teacher's decision not to display student's class project depicting Jesus, applying forum analysis instead); *Walz*, 342 F.3d 271 (rejecting challenge to constitutionality of school's restrictions on elementary student's classroom

to justify them on the basis of a demonstrated need to alleviate or avert serious disorder could be enough to chill school districts from trying policies that may prove beneficial to students and desirable to parents.[39] Similarly, efforts to strike a balance between the popularity of increasingly versatile portable electronic devices such as cell phones and the real issues they pose in the school environment could be complicated by fear that, given that such devices can serve expressive purposes, these efforts must withstand judicial scrutiny on the basis not of mere rationality but of substantial disruption.[40] For that matter, the leap is not so great between

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O'Brien test is "virtually the same" as time, place, and manner analysis); *Jacobs v. Clark County Sch. Dist*., 373 F.Supp.2d 1162 (D. Nev. 2005) (rejecting application of *Tinker* to school uniform policy); *Phoenix Elementary Sch. Dist. No. 1 v. Green*,

subjecting mere time, place, and manner regulations to this standard and placing the legal onus on educators to justify in federal court their decisions on such mundane matters as seating arrangements.[41]

The forum-oriented framework that the federal Equal Access Act sets forth governing access to various school fora for student expression originating in school-sponsored noncurricular clubs also is in tension with a *Tinker* approach.[42] While this kind of expression inhabits a realm somewhere between the student speech at issue in this case and school-sponsored speech at issue in cases like *Hazelwood*, the District Court's approach to content neutral rules would suggest that school officials may not set neutral criteria for access by all noncurricular clubs to various school fora where such criteria are more restrictive than necessary to avoid material and substantial disruption.[43]

Carried to its logical conclusion, applying *Tinker* to situations previously evaluated using forum analysis also is inconsistent with court holdings that school

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(forbidding possession without school permission of electronic pager by student on school property).

[41] *E.g*, *LoPresti v. Galloway Twp. Middle Sch*., 885 A.2d 962 (N.J. Super. 2004) (rejecting *Tinker* challenge to middle school cafeteria policy assigning students to designated tables since policy restricted no content of expression and school was nonpublic forum, allowing school officials to impose reasonable restrictions on speech).

[42] 20 U.S.C.A. §§ 4071-4074 (2007).

[43] *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (holding Equal Access Act requires school to provide covered clubs with same access to all school fora).

officials enjoy the discretion to narrow a forum.[44] Until now these decisions never have suggested that such a decision is foreclosed unless necessitated by the need to avoid a material and substantial disruption. Under this higher standard, for example, a school could be precluded from deciding to narrow access to a school forum for all parties in a viewpoint and content neutral manner out of a simple preference that whatever effort school personnel must put into supervising that forum be devoted to other educational priorities.

In some of the foregoing situations, schools conceivably might be able to demonstrate material and substantial disruption. This is of scant consolation to school boards, however, if the more restrictive standard will bring about more frequent legal challenges to what are now routine school decisions and if the evidentiary onus on school officials to justify these decisions is increased.[45]

Indeed, this case highlights the danger that "the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students" so that "larger numbers of those disputes will likely make

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[44] *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999) (holding school board had inherent right to control its property and close previously open forum). 45

their way from the schoolhouse to the courthouse."[46] Given the variety of student speech lawsuits and the particularly intense and strategic efforts "by the friends of religion or by its enemies,"[47] this fear is well-placed. The costs of this dynamic to the nation's schools, measured in legal costs, defensive behavior by school officials fearful of litigation, distraction from the academic mission, and community divisiveness, ultimately are borne by children.

III. Properly Evaluating Time, Place, And Manner Restrictions On Student Speech Using Forum Analysis Would

consistent neither with this Court's recognition that a public forum is not created inadvertently but only with intent,[48] nor with the strong implications in this Court's earlier holdings that school hallways constitute a nonpublic forum.[49]

To the extent the District Court suggested that the school district's arguments were undermined by its concession that the student would be able to

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[48] *United Food & Commercial Workers Local 1099*, 364 F.3d at 749 (noting "government does not create a public forum by inaction or by permitting limited discourse but only intentionally opening up a nontraditional forum for public discourse" and finding no evidence state intended to open up "nontraditional forums such as schools … for public discourse merely by utilizing portions of them as polling places").

[49] *See id.* (holding parking lots and sidewalks leading to schools and other polling places were nonpublic fora absent evidence of government intent to open these fora for public discourse); *Kincaid*, 236 F.3d at 349 (noting that "[t]o determine whether the government intended to create a limited public forum, we look to the government's policy and practice with respect to the forum, as well as to the nature of the property at issue and its 'compatibility with expressive activity'" and that "context within which the forum is found is relevant" to determination). *Cf. Washegesic v. Bloomingdale Pub. Sch.*, 813 F.Supp. 559, 565 n.16 (rejecting school district's argument, for purposes of Establishment Clause challenge to school's portrait of Jesus, that hallway was not limited public forum, noting that school controlled content of what was posted) *aff'd*, 33 F.3d 679 (6th Cir. 1994) (noting school maintained right to control what was posted in hallways and did not offer space to other religions). *See also Peck*, 426 F.3d at 626-27 (concluding elementary school was nonpublic forum); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) (holding junior high school had not "opened its doors wide enough to make the school a 'limited public forum'" in case challenging restriction of student distribution of materials); *Phillips v. Oxford Separate Mun. Sch. Dist.*, 314 F.Supp.2d 643, 648 (N.D. Miss. 2003) (finding hallways were not public forum); *Hemry v. School Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F.Supp. 856, 862 (D. Colo. 1991) (finding purpose of school hallways is to facilitate movement of students between classrooms, not to provide place for speaker to set up a soap box); *Nelson v. Moline Sch. Dist.*, 725 F.Supp. 965, 974 (C.D. Ill. 1989) (holding public school hallways are nonpublic forum during school hours).

express verbally the views articulated in his printed materials, this would effectively render all regulation of non-verbal expression invalid and all forum analysis moot where the government does not impose some kind of gag rule. This is incompatible with this Court's and other court's previous rulings upholding public restrictions on non-verbal communications, let alone those upholding restrictions that applied to some but not all similar modes of communication.[50] As this Court has observed, the U.S. Supreme Court instructs that "problems of underinclusiveness are rarely problems of constitutional magnitude, unless they signify an impermissible discriminatory motive."[51]

To the extent the District Court's standard of review under its forum analysis essentially weighed "reasonableness" with reference back to the *Tinker* "material and substantial disruption" standard, it is difficult to discern the point of the courts having engaged in forum analysis in the first place. In the end, the results of this approach to forum analysis are the same implausible ones as outlined above (*supra* II).

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[50] *E.g.*, *Ater v. Armstrong*, 961 F.2d 1224 (6th Cir. 1992) (upholding statute prohibiting distribution of literature, but permitting solicitayer

As this Court has noted, even in a traditional or designated public forum, the government may impose reasonable time, place, and manner restrictions.[52] Even here, "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.'"[53] This being so, *Tinker* cannot be the touchstone of reasonableness even in a traditional public forum, let alone in a nonpublic forum.

B. Relying On Forum Analysis Appropriately Deferential To The Professional Judgment Of Educ5ApprsT 58 yerests.'"

In a designated or limited public forum, a content-based restriction on speech must be narrowly tailored to serve a compelling government interest.[54] However, even a content-neutral regulation on the time, place, and manner of speech may be found unreasonable.[55]

In a nonpublic forum, if the intent of the restriction is solely to suppress a point of view or is not reasonable in light of the forum's purpose, it will be invalidated.[56] Even under the deferential standard applicable to nonpublic fora, a court evaluating the reasonableness of a restriction considers the availability or absence of alternate channels of communications.[57] In addition, a regulation may

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[54] *Kincaid*, 236 F.3d at 348, 354.

[55] *Id*. at 354-55 (holding university's confiscation of yearbooks unreasonable where done without notice, with no eventual distribution of books, and without alternative grounds for similar expressive activity); *Morgan v. Plano Indep. Sch. Dist*., slip op., 2007 WL 654308 (E.D. Tex. Feb. 26, 2007) (finding, without explanation, that school district policy against distributing materials in elementary school cafeterias reached "more broadly than is reasonably necessary").

[56] *Kincaid*, 236 F.3d at 355-56 (holding university's confiscation of yearbooks would have been unreasonable even if evaluated under "relaxed standard" applicable to nonpublic forum, where yearbook fulfilled forum's purpose, university's actions were arbitrary and conflicted with own policy, and "smack[ed] of viewpoint discrimination"); *Ater*, 961 F.3d at 1228 (finding prohibition on distribution of literature on public roadways motivated by intent to suppress information not by safety considerations).

[57] *Ater*, 961 F.2d at 1227. However, to apply to this inquiry the stringent approach the District Court utilized in its overbreadth analysis—*i.e*., whether the alternate avenues have any disadvantages

as to put a reasonable student on notice as to what is required[61] and must not be arbitrarily enforced.[62] While the District Court's Order and Opinion referred only in passing to overbreadth in connection with its *Tinker* discussion,[63] a school policy must not burden substantially more speech than is necessary to further the government's interest.[64]

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[61] *Brentwood Acad.*, 262 F.3d at 557 (even though recruiting rule by itself was subject to vagueness and overbreadth challenge, the accompanying question and answer section and interpretive guidelines satisfied reasonable notice requirement); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1368 (10th Cir. 2000) (stating policy "might be void for vagueness if a reasonable student of ordinary intelligence who read the policy could not understand what conduct it prohibited"); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1998) (invalidating school regulation against "gang" colors, symbols and other expression as void for vagueness).

[62] *Stephenson*

In sum, a school is not free to flout the First Amendment under forum analysis, and a court can correct the occasional school misstep without risking broad, unintended consequences.

CONCLUSION

For all of the above reasons, *Amici* urge this Court to view skeptically the suggestion that it must take another step

Respectfully submitted,

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